83 - 1893

No.

Office - Supreme Court, U.S
FILED
MAY 18 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

v.

MARTIN INDUSTRIES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission
Washington, D.C. 20507

BEST AVAILABLE COPY

1988

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over this appeal under 28 U.S.C. 1252 even though the Equal Employment Opportunity Commission does not seek review of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977, 5 U.S.C. 906, is unconstitutional, but instead seeks review only of the relief ordered by the district court.

2. Whether the district court correctly held that, because the legislative veto provision in the Reorganization Act is unconstitutional, the Commission cannot exercise the authority transferred to it by Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), to enforce the Equal Pay Act of 1963, 29 U.S.C. 206(d).

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory and reorganization plan provisions involved	2
Statement	2
This Court does not have jurisdiction over the appeal under 28 U.S.C. 1252	4
The question is substantial	6
Conclusion	7
Appendix A	1a
Appendix B	4a
Appendix C	6a

TABLE OF AUTHORITIES

Cases:

EEOC v. *Allstate Insurance Co.*, 570 F. Supp. 1224, appeal pending, No. 83-1021 ..... 2, 3, 4, 5, 6, 7
EEOC v. *City of Waco*, No. 82-CA-11 (W.D. Tex. Mar. 14, 1984) 7
EEOC v. *County of Allegheny*, No. 79-1531 (W.D. Pa. Apr. 24, 1984) 7
EEOC v. *County of Hudson*, No. 83-1669(D) (D.N.J. Mar. 12, 1984) 7
EEOC v. *Elrod*, No. 79 C 4120 (N.D. Ill. Mar. 20, 1984) 7
EEOC v. *Fairfax County*, No. 84-83-A (E.D. Va. Mar. 2, 1984) 6
EEOC v. *Hernando Bank, Inc.*, 724 F.2d 1188 6
EEOC v. *Ingersoll Johnson Steel Co.*, 34 Fair Empl. Prac. Cas. (BNA) 875 (S.D. Ind. Apr. 5, 1984) 7
EEOC v. *International Mill Service*, 34 Fair Empl. Prac. Cas. (BNA) 392 (E.D. Pa. Feb. 22, 1984) 6
EEOC v. *Natural Gas Pipeline Co. of America*, No. LRC 83444 (E.D. Ark. Feb. 22, 1984) 7

Cases—Continued: Page

EEOC v. *New York*, 34 Fair Emlp. Prac. Cas. (BNA) 379 (N.D.N.Y. Jan. 31, 1984) 6
EEOC v. *Old Dominion Freight Line Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 377 (M.D.N.C. Mar. 7, 1984) 6-7
EEOC v. *Pan American World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321 (N.D. Cal. Mar. 6, 1984) 6
EEOC v. *Plessey, Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 500 (D. Kan. Mar. 12, 1984) 7
EEOC v. *Radio Montgomery, Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 378 (W.D. Va. Feb. 22, 1984) 6
EEOC v. *U.S. Steel Corp.*, Misc. No. 10403 (W.D. Pa. Apr. 5, 1984) 7
EEOC v. *Walmart Stores, Inc.*, No. CV-83-C-2268 (N.D. Ala. Apr. 24, 1984) 7
EEOC v. *Westinghouse Electric Corp.*, Civ. No. 83-1209 (W.D. Pa. Jan. 5, 1984) 7
Heckler v. *Edwards*, No. 82-874 (Mar. 21, 1984) 5, 6
INS v. *Chadha*, No. 80-1832 (June 23, 1983) 3, 4

Statutes and regulation:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* 6
Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 *et seq.* 3
§ 3, 77 Stat. 56 2
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*:
§ 6(d), 29 U.S.C. 206(d) 2, 3
§ 16(c), 29 U.S.C. 216(c) 2, 3
§ 17, 29 U.S.C. 217 ..... 2, 3
Reorganization Act of 1977, 5 U.S.C. 901 *et seq.* 2, 3
5 U.S.C. 906 3
28 U.S.C. 1252 ..... 4, 5, 6
28 U.S.C. 1291 7
Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1983

No.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, APPELLANT

v.

MARTIN INDUSTRIES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App., *infra*, 1a-3a) is reported at 581 F. Supp. 1029.

JURISDICTION

The order of the district court granting appellee's motion for summary judgment was entered on February 24, 1984 (App., *infra*, 4a-5a). Motions to alter or amend the judgment were filed by the Equal Employment Opportunity Commission and by appellee on March 2 and 5, 1984, respectively. The district court denied those motions on March 5 and

6, 1984. A notice of appeal to this Court was filed by the Commission on March 20, 1984 (App., *infra*, 6a-7a), and a notice of cross-appeal was filed by appellee on March 30, 1984.

If this Court has jurisdiction in this case, it would be under 28 U.S.C. 1252. However, we do not believe the Court has jurisdiction under 28 U.S.C. 1252 because the Commission does not seek review of the district court's holding that the legislative veto provision of the Reorganization Act of 1977 is unconstitutional. Thus, this appeal, like the Commission's identical appeal in *EEOC* v. *Allstate Insurance Co.*, No. 83-1021, is taken for protective purposes only. The Commission also has filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit, under 28 U.S.C. 1291.

STATUTORY AND REORGANIZATION PLAN PROVISIONS INVOLVED

The relevant provisions of the Reorganization Act of 1977, 5 U.S.C. 901 *et seq.*; the Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56, adding Section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d); Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. 216(c) and 217; and Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), are set forth in the Commission's Jurisdictional Statement Appendix at 22a-30a, *EEOC* v. *Allstate Insurance Co.*, No. 83-1021.

STATEMENT

This action was filed by the Equal Employment Opportunity Commission in the United States District Court for the Northern District of Alabama on September 29, 1983, pursuant to Sections 16(c) and 17 of the Fair Labor Standards Act of 1938, 29 U.S.C.

216(c) and 217. The Commission's complaint alleges that appellee Martin Industries, Inc., is violating Section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)—commonly known as the Equal Pay Act—by paying lower wages to female employees than it pays to male employees performing equal work (Comp. ¶ 7). App., *infra*, 2a.

When the Equal Pay Act was first enacted in 1963 (Pub. L. No. 88-38, 77 Stat. 56), enforcement authority was vested in the Secretary of Labor, who is responsible for administering the Fair Labor Standards Act generally. See 29 U.S.C. 206(d)(3), 216(c) and 217. However, responsibility for administration and enforcement of the Equal Pay Act was transferred from the Secretary of Labor to the Commission by Reorganization Plan No. 1 of 1978, 3 C.F.R. 321 (1979), which also transferred other equal employment opportunity functions to the Commission. See J.S. 3-4, *EEOC* v. *Allstate Insurance Co.*, *supra*.

On February 2, 1984, appellee moved for summary judgment, contending that the transfer of authority to the Commission to enforce the Equal Pay Act was invalid because the statutory authority for the Reorganization Plan's promulgation—the Reorganization Act of 1977, U.S.C. 901 *et seq.*—contained an unconstitutional legislative veto provision (5 U.S.C. 906). The Commission conceded that the legislative veto provision in the Reorganization Act was unconstitutional in light of this Court's decision in *INS* v. *Chadha*, No. 80-1832 (June 23, 1983). It contended, however, that dismissal of the Commission's enforcement action was improper because the one-House veto provision is severable from the remainder of the Reorganization Act, because the decision in *Chadha*

should not be applied retroactively to invalidate plans that were not vetoed and therefore went into effect prior to the date of the *Chadha* decision, and because Congress in any event had ratified the transfer of authority to the Commission.

On February 23, 1984, while appellee's motion for summary judgment was still pending, the Commission and appellee filed with the district court a proposed consent decree that provided for backpay for three employees and obligated appellee to comply with the requirements of the Equal Pay Act in the future (App., *infra*, 1a). The court refused to approve the decree because, in its view, the Commission was without "authority to bring this action" (*id.* at 2a). Instead, relying on *EEOC* v. *Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), direct appeal pending, No. 83-1021, the court granted appellee's previously filed motion for summary judgment on the ground that the transfer of Equal Pay Act enforcement authority to the Commission was invalid because of the legislative veto provision in the Reorganization Act.

THIS COURT DOES NOT HAVE JURISDICTION OVER THE APPEAL UNDER 28 U.S.C. 1252

This direct appeal under 28 U.S.C. 1252 has been docketed for protective purposes only, pending the Court's disposition of the Commission's direct appeal in *EEOC* v. *Allstate Insurance Co.*, No. 83-1021, which presents identical questions concerning this Court's jurisdiction under 28 U.S.C. 1252 and the Commission's authority to enforce the Equal Pay Act. In the Jurisdictional Statement in *Allstate* (at 6-8,

17),[1] we argue that this Court does not have jurisdiction over the direct appeal because the Commission does not seek review of the district court's holding that the legislative veto provision of the Reorganization Act is unconstitutional, but instead seeks review of other issues. Those other issues are: whether the legislative veto provision is severable from the remainder of the Reorganization Act; whether Congress intended when it passed the Reorganization Act in 1977 that reorganization plans that were not vetoed by one House of Congress should be invalidated if the latent legislative veto authority in the Act subsequently was held unconstitutional; whether this Court's decision in *Chadha* should be applied retroactively to invalidate completed reorganization plans; and whether Congress in any event has ratified the transfer of enforcement authority to the Commission (see 83-1021 J.S. 8-17). We suggested when we filed the Jurisdictional Statement in *Allstate* (at 8, 17) that the Court hold that Jurisdictional Statement pending the Court's decision in *Heckler* v. *Edwards*, No. 82-874, which also presented the question whether this Court has jurisdiction of an appeal under 28 U.S.C. 1252 where the appellant does not seek review of the district court's holding that a provision in an Act of Congress is unconstitutional.

On March 21, 1984, the Court rendered its decision in *Heckler* v. *Edwards*, concluding that a direct appeal does not lie under 28 U.S.C. 1252 "unless the holding of federal statutory unconstitutionality is in issue" (slip op. 5). Because the Commission's appeal in the instant case does not place in issue the district

---

[1] We are furnishing counsel for appellee with copies of the Jurisdictional Statement, Reply Brief, and Supplemental Memorandum in *Allstate*.

court's holding that the legislative veto provision of the Reorganization Act is unconstitutional, it follows from *Edwards* that the Court does not have jurisdiction over this appeal under 28 U.S.C. 1252. However, because the Court has not yet disposed of the Commission's appeal in identical circumstances in *Allstate*, we are docketing this appeal as a protective matter.

THE QUESTION IS SUBSTANTIAL

If the Court nevertheless determines that it has jurisdiction over this appeal, we submit, for the reasons stated in our Jurisdictional Statement in *Allstate* (at 8-16), that the district court erred in concluding that the Commission does not have authority to enforce the Equal Pay Act. We note in this connection that the overwhelming majority of lower courts now have agreed that the holding by the district court in *Allstate* is erroneous and that the Commission does possess the authority to enforce the Equal Pay Act and the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*[2]

---

[2] In addition to the Fifth Circuit's decision in *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188 (1984), which was discussed in our Supplemental Memorandum in *Allstate*, and the seven district court decisions mentioned in our Reply Brief in *Allstate* (at 4 n.2), there now have been 15 other district court decisions sustaining the Commission's authority to sue to enforce the Equal Pay Act or the Age Discrimination in Employment Act. See *EEOC* v. *New York*, 34 Fair Empl. Prac. Cas. (BNA) 379 (N.D.N.Y. Jan. 31, 1984); *EEOC* v. *International Mill Service*, 34 Fair Empl. Prac. Cas. (BNA) 392 (E.D. Pa. Feb. 22, 1984); *EEOC* v. *Fairfax County*, No. 84-83-A (E.D. Va. Mar. 2, 1984); *EEOC* v. *Radio Montgomery, Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 378 (W.D. Va. Feb. 22, 1984); *EEOC* v. *Pan American World Airways*, 34 Fair Empl. Prac. Cas. (BNA) 321 (N.D. Cal. Mar. 6, 1984); *EEOC* v. *Old Dominion Freight Line, Inc.*, 34 Fair Empl. Prac. Cas (BNA)

CONCLUSION

The Jurisdictional Statement in this case should be held pending the Court's disposition of the appeal in *EEOC* v. *Allstate Insurance Co.*, No. 83-1021, and then be disposed of in light of the Court's action in *Allstate*.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID L. SLATE
General Counsel
Equal Employment Opportunity Commission

MAY 1984

---

377 (M.D.N.C. Mar. 7, 1984); *EEOC* v. *Plessey, Inc.*, 34 Fair Empl. Prac. Cas. (BNA) 500 (D. Kan. Mar. 12, 1984); *EEOC* v. *Natural Gas Pipeline Co. of America*, No. LRC 83444 (E.D. Ark. Feb. 22, 1984) (bench ruling), interlocutory appeal pending, No. 84-1404-EA (8th Cir.); *EEOC* v. *Elrod*, No. 79 C 4120 (N.D. Ill. Mar. 20, 1984); *EEOC* v. *Ingersoll Johnson Steel Co.*, 34 Fair Empl. Prac. Cas. (BNA) 875 (S.D. Ind. Apr. 5, 1984); *EEOC* v. *U.S. Steel Corp.*, Misc. No. 10403 (W.D. Pa. Apr. 5, 1984); *EEOC* v. *County of Hudson*, No. 83-1669(D) (D.N.J. Mar. 12, 1984); *EEOC* v. *City of Waco*, No. 82-CA-11 (W.D. Tex. Mar. 14, 1984); *EEOC* v. *WalMart Stores, Inc.*, No. CV-83-C-2268 (N.D. Ala. Apr. 24, 1984); *EEOC* v. *County of Allegheny*, No. 79-1531 (W.D. Pa. Apr. 24, 1984).

The only contrary holdings are those of the district courts in this case, in *Allstate*, and in *EEOC* v. *Westinghouse Electric Corp.*, Civ. No. 83-1209 (W.D. Pa. Jan. 5, 1984). By order dated March 21, 1984, Justice Brennan extended the time within which to docket the direct appeal in *Westinghouse* to and including May 30, 1984. As in *Allstate* and the instant case, the Commission, in addition to filing a notice of direct appeal to this Court, has filed a notice of appeal to the court of appeals pursuant to 28 U.S.C. 1291 in *Westinghouse*, No. 83-3073 (3d Cir.).

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

Civil Action No. 83-AR-5699-NW

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

vs.

MARTIN INDUSTRIES, INC., DEFENDANT

[Filed Feb. 24, 1984]

MEMORANDUM OPINION

By order entered on February 13, 1984, this Court conditionally granted the joint motion of the parties for a stay, and granted the parties to and including February 22, 1984, to present a settlement agreement satisfactory to the Court. No such agreement has been presented. Instead, the parties on February 22, 1984, requested another stay, which is due to be denied, and on February 23, 1984, presented a proposed consent decree which is not satisfactory to the Court. A copy of the said proposed decree is attached hereto as Exhibit "A". Not only does the proposed decree come too late but it purports to confer jurisdiction on this Court and by "agreement" to confer upon a plaintiff which has no standing to complain a standing to complain. As will hereinafter become appar-

ent, this Court does not believe that plaintiff, Equal Employment Opportunity Commission (EEOC), had the jurisdiction to investigate the charges of a violation of the Equal Pay Act as here alleged, or the authority to bring this action, and this Court is unwilling to become a party to an adjudication, including an injunction, which purports to be binding but which, in the Court's opinion, would not be binding. Therefore, the Court will proceed to consider defendant's motion for summary judgment.

On September 29, 1983, the EEOC filed this action against Martin Industries, Inc. (Martin), charging a violation of the Equal Pay Act, 29 U.S.C. § 206. Martin filed a motion for summary judgment based on *EEOC v. Allstate Insurance Company*, 32 FEP Cases 1337 (S.D. Miss. 1983), which holds that the rationale of the Supreme Court in *Immigration & Naturalization Service v. Chada* [*sic*], —— U.S. ——, 103 S.Ct. 2764 (1983), requires the conclusion that the entire Reorganization Act of 1977 is invalid and therefore is ineffectual in its attempt to transfer the authority to administer the Equal Pay Act from the United States Department of Labor to the EEOC. The EEOC countered with *Muller Optical Company v. EEOC*, 33 FEP Cases 420 (W.D. Tenn. 1983), and *EEOC v. City of Memphis*, 33 FEP Cases 1089 (W.D. Tenn. 1983), both of which reject *EEOC v. Allstate*. If *EEOC v. Allstate* is correct, the EEOC had no jurisdiction or authority, and therefore this Court cannot allow the EEOC to speak in this Court on behalf of individuals in an Equal Pay Act case.

This Court has carefully compared the reasoning employed in these three conflicting cases, has read Martin's brief, a copy of which is attached hereto as Exhibit "B", and is satisfied that Judge Barbour in

EEOC v. Allstate, and Martin in the instant case, have much the better of the argument. Judge Barbour's reasoning is impeccable. If this judge were not bound by *state decisis* and had his choice in the matter he would join Mr. Justice White in his dissent in *Chadha*, and would find nothing unconstitutional in a congressional attempt to shackle what Congress perceived to be a runaway rule-making monster. This Court sympathizes with congressional recognition that the retention of a right of legislative veto may be the only practical means of reining in the law-making bureaucracy, which is no longer truly a part of the Executive Branch (and thus theoretically under Presidential control) but rather now constitutes a Fourth Branch with its own mind and will. However, this judge recognizes his duty under *stare decisis*, as did Judge Barbour, and acknowledges that it gets its marching orders from the majority of the Supreme Court and not from its dissenters.

Undoubtedly this issue will not finally be resolved in the Southern District of Mississippi, nor in the Western District of Tennessee, nor in the Northern District of Alabama, but in the Supreme Court of the United States. Nevertheless, this Court is willing to take its stand with Judge Barbour unless and until the Eleventh Circuit or the Supreme Court finds a way around *Chada* [*sic*].

An appropriate order is being contemporaneously entered.

DONE this 24th day of February, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

Civil Action No. 83-AR-5699-NW

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

vs.

MARTIN INDUSTRIES, INC., DEFENDANT

[Filed Feb. 24, 1984]

FINAL JUDGMENT

In conformity with the Memorandum Opinion entered this day in the above entitled civil action, the motion of February 22, 1984, for an additional stay is DENIED. The Court expressly determines that there is no genuine issue as to any material fact, and that defendant is entitled to judgment as a matter of law.

Accordingly, it is ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment be and the same is hereby GRANTED, and plaintiff's complaint is hereby DISMISSED. This, of course, does not prevent defendant from paying $951.80 to Barbara J. Smith, $1,772.66 to Renae H.

Shannon and $3,275.54 to Joyce Crowder, and obtaining release from them, if defendant wishes to do so.

Costs are taxed against plaintiff.

DONE this 24th day of February, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

Civil Action No. CV83-AR-5699-NW

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PLAINTIFF

v.

MARTIN INDUSTRIES, INC., DEFENDANT

[Filed Mar. 20, 1984]

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE
UNITED STATES

Notice is hereby given that the Equal Employment Opportunity Commission, the above-named plaintiff, hereby appeals to the Supreme Court of the United States from the order entered on February 24, 1984, by the District Court for the Northern District of Alabama, dismissing plaintiff's action.

The appeal is taken pursuant to 28 U.S.C. § 1252.

Respectfully submitted,

DAVID L. SLATE
General Counsel

MICHAEL A. MIDDLETON
Associate General Counsel

Equal Employment Opportunity
Commission
2401 "E" Street, Northwest
Washington, D.C. 20507

/s/ Jerome C. Rose
JEROME C. ROSE
Regional Attorney

/s/ W. L. Williams, Jr.
W. L. WILLIAMS, JR.
Supervisory Trial Attorney

/s/ Eugene W. Fuquay
EUGENE W. FUQUAY
Senior Trial Attorney

Equal Employment Opportunity
Commission
Birmingham District Office
2121 Eighth Avenue, North
Birmingham, AL 35203-2397
Telephone: (205) 254-0608

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421823 550

Office-Supreme Court, U.S.
FILED
AUG 30 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1893

IN THE

Supreme Court Of The United States

October Term, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant

v.

MARTIN INDUSTRIES, INC.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO DISMISS

JAMES P. ALEXANDER
James Walker May
Eldridge D. Lacy
Bradley, Arant, Rose & White
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

Attorneys for Appellee
Martin Industries, Inc.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

BEST AVAILABLE COPY

16 pp

QUESTION PRESENTED

Whether the Court has jurisdiction under 28 U.S.C. 1252 over this appeal which merely seeks review of the relief ordered by the district court and not of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977 (5 U.S.C. 906) is unconstitutional, and which the Appellant concedes that the Court is without jurisdiction to review.

MARTIN INDUSTRIES, INC.'S PARENT, AFFILIATES AND SUBSIDIARIES

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Martin Industries, Inc., avers that it has no parent companies, affiliates or subsidiaries, except for its wholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MARTIN INDUSTRIES, INC.'S PARENT, AFFILIATES AND SUBSIDIARIES ii

TABLE OF AUTHORITIES iv

MOTION 1

ARGUMENT 1

CONCLUSION 5

APPENDIX A 1a

TABLE OF AUTHORITIES

Cases: *Page*

Anderson v. Celebreeze, ___ U.S. ___, 103 S. Ct. ___, 76 L. Ed. 2d 547 (1983) ... 3

Edelman v. Jordan, 415 U.S. 651, 670-71 (1974) ... 3

EEOC v. Allstate Insurance Co., 570 F. Supp. 1224 (S.D. Miss. 1983), appeal dismissed, No. 83-1021 (June 11, 1984) ... 2, 3

EEOC v. Cudahy Foods Co., ___ F. Supp. ___, 33 FEP Cases 1836 (W.D. Wash. 1983) ... 4

EEOC v. CBS, Inc., ___ F. Supp. ___, 33 FEP Cases 257 (S.D. N.Y. 1984), *interlocutory appeal pending* No. 84-6063 (CA 2 docketed February 28, 1984) ... 4

EEOC v. Chrysler Corp., ___ F. Supp. ___, 34 FEP Cases 1862 (N.D. Ga. 1984) ... 4

EEOC v. City of Memphis, 581 F. Supp. 179 (W.D. Tenn. 1983) ... 4

EEOC v. Dayton P&L Co., ___ F. Supp. ___, 35 FEP Cases 401 (S.D. Ohio 1984) ... 4

EEOC v. El Paso National Gas Co., ___ F. Supp. ___, 33 FEP Cases 1837 (W.D. Texas 1984) ... 4

EEOC v. Hernando Bank, Inc., 724 F. 2d 1188 (CA 5 1984) ... 4

EEOC v. Ingersoll Johnson Steel Co., 583 F. Supp. 983 (S.D. Ind. 1984) ... 4

EEOC v. International Mill Service, Inc., ___ F. Supp. ___, 34 FEP Cases 392 (E.D. Pa. 1984) ... 4

EEOC v. Jackson County, ___ F. Supp. ___, 33 FEP Cases 963 (W.D. Mo. 1983) ... 4

EEOC v. Old Dominion Freight Lines, Inc., ___ F. Supp. ___, 34 FEP Cases 377 (M.D. N.C. 1984) ... 4

TABLE OF AUTHORITIES — (Continued)

Cases: *Page*

EEOC v. Pan American World Airways, Inc., F. Supp. , 34 FEP Cases 321 (N.D. Calif. 1984) 4

EEOC v. Plessey, Inc., F. Supp. , 34 FEP Cases 500 (D. Kansas 1984) 4

EEOC v. Radio Montgomery, Inc., F. Supp. , 34 FEP Cases 378 (W.D. Va. 1984) 4

EEOC v. State of New York, F. Supp. , 34 FEP Cases 379 (N.D. N.Y. 1984) 4

EEOC v. U.S. Steel Corp., F. Supp. , 34 FEP Cases 1091 (W.D. Pa. 1984) 4

EEOC v. Westinghouse, F. Supp. , 33 FEP Cases 1232 (W.D. Pa. 1984) 4

Meek v. Pittinger, 421 U.S. 349, 367 n. 16 (1975) 3

Muller Optical Co. v. EEOC, 574 F. Supp. 946 (W.D. Tenn. 1983), appeal pending, No. 83-5889 (CA 6 docketed November 19, 1983) 4

Richardson v. Ramirez, 418 U.S. 24, 53 (1974) 3

Statutes and Regulations:

Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. 4

Equal Pay Act of 1963, 29 U.S.C. 206 (d) 4

Reorganization Act of 1977, 5 U.S.C. 901 et seq. 2
5 U.S.C. 906 i

28 U.S.C. 1252 2

28 U.S.C. 1291 5

Miscellaneous:

Stern and Gressman, Supreme Court Practice (5th ed. 1978) 3

No. 83-1893

IN THE

Supreme Court Of The United States

October Term, 1983

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Appellant

v.

MARTIN INDUSTRIES, INC.,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION OF APPELLEE MARTIN INDUSTRIES, INC. TO DISMISS

The Appellee, Martin Industries, Inc., respectfully moves to dismiss this direct appeal from the district court on the ground that the Court lacks jurisdiction. Martin Industries adopts the Statement of the Facts and the Statement of the Statutory and Reorganization Plan Provisions involved found in Appellant EEOC's Jurisdictional Statement at pages 1-2.

MOTION TO DISMISS

Appellee, Martin Industries, Inc., hereby moves to dismiss the appeal on the ground that this Court does not have

jurisdiction over the appeal under 28 U.S.C. 1252. The Court lacks jurisdiction under 28 U.S.C. 1252 as the appeal merely seeks review of the relief ordered by the district court, the granting of Martin's motion for summary judgment, and not of the district court's holding that the one-House legislative veto provision of the Reorganization Act of 1977, 5 U.S.C. 901 et seq., is unconstitutional. Indeed, in its Jurisdictional Statement in this appeal, the Appellant stated

> This Court does not have jurisdiction over the direct appeal because the Commission does not seek review of the district court's holding that the legislative veto provision of the Reorganization Act is unconstitutional, but instead seeks review of other issues. Those other issues are: whether the legislative veto provision is severable from the remainder of the Reorganization Act; whether Congress intended when it passed the Reorganization Act in 1977 that reorganization plans that were not vetoed by one house of Congress should be invalidated if the legislative veto authority in the Act subsequently was held unconstitutional; whether this Court's decision in Chadha should be applied retroactively to invalidate completed reorganization plans; and whether Congress in any event has ratified the transfer of the enforcement authority to the Commission.

Jurisdictional Statement of EEOC in *EEOC v. Martin Industries,* p. 5.[1] Thus, as Appellant asserts, not only does this appeal fail to seek review of the district court's holding on the constitutionality of legislative one-House veto provision of the Reorganization Act of 1977, but even if the Appellant sought review of the district court's holding on

[1]The Appellant's Jurisdictional Statement in *EEOC v. Allstate,* No. 83-1021, appeal dismissed (June 11, 1984), likewise did not "seek review of the holding that an Act of Congress is unconstitutional and instead challenge[d] only the relief granted by the district court." Jurisdictional Statement of EEOC in *EEOC v. Allstate,* p. 6.

this issue, due to alternative holdings avoiding the constitutional question, *i.e.*, severability, ratification, etc., resolution of this issue would not be appropriate.

The Appellant has likewise indicated in its Jurisdictional Statement that this appeal was taken for protective purposes only, stating

> This appeal was docketed for protective purposes only pending the court's disposition of the Commission's direct appeal on *EEOC v. Allstate Insurance Co.*, No. 83-1021, which presents identical questions concerning the court's jurisdiction under 28 U.S.C. 1252 and the Commission's authority to enforce the Equal Pay Act.

Id. at p. 4. As the Solicitor General concedes, this case is identical to *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983); and was docketed for protective purposes only pending the court's disposition in *Allstate*. Subsequently, however, on June 11, 1984, *Allstate* was dismissed without opinion by the court for want of jurisdiction. Thus, the grounds for the Solicitor General's appeal no longer exist. Moreover, the Court's summary affirmances and dismissals are "on the merits, entitled to precedential weight." *Anderson v. Celebreeze*, ... U.S. ....., 103 Sup. Ct. ....., 75 L. Ed. 2d 547 (1983); *Meek v. Pittenger*, 421 U.S. 349, 367 n. 16 (1975); *Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974); *Richardson v. Ramirez*, 418 U.S. 24, 53 (1974); Stern and Gressman, Supreme Court Practice 327-28 (5th ed. 1978). Thus, dismissal for lack of jurisdiction is dictated by the Court's recent decision in *Allstate*. Indeed, Martin is at a loss as to why the Court has called for a response to Appellant's Jurisdictional Statement in this case.

Even if the Court were inclined to take jurisdiction, unlike other suits involving the issue of the EEOC's enforce-

ment authority under the Equal Pay Act of 1963, 29 U.S.C. 206 (d), and the Age Discrimination in Employment Act, 29 U.S.C. 621 et seq.,[2] Martin's sole interest is entry of its proposed consent decree with the EEOC.[3]

---

[2]To date *EEOC v. Allstate, supra*, and *EEOC v. Westinghouse*, _____ F. Supp. _____, 33 FEP Cases 1232 (W.D. Pa. 1984), represent the only decisions rejecting the EEOC's authority to enforce the Age Discrimination in Employment Act and Equal Pay Act. The following courts have held that the EEOC lacks enforcement authority under the Equal Pay Act and Age Discrimination in Employment Act: *EEOC v. Hernando Bank, Inc.*, 724 F. 2d 1188 (CA 5 1984); *EEOC v. Dayton P&L Co.*, _____ F. Supp. _____, 35 FEP Cases 401 (S.D. Ohio 1984); *EEOC v. Pan American World Airways, Inc.*, _____ F. Supp. _____, 34 FEP Cases 321 (N.D. Calif. 1984); *EEOC v. CBS, Inc.*, _____ F. Supp. _____, 34 FEP Cases 257 (S.D. N.Y. 1984), *interlocutory appeal pending* No. 84-6063 (CA 2, docketed February 28, 1984); *EEOC v. Old Dominion Freight Lines, Inc.*, _____ F. Supp. _____, 34 FEP Cases 377 (M.D. N.C. 1984); *EEOC v. Radio Montgomery, Inc.*, _____ F. Supp. _____, 34 FEP Cases 378 (W.D. Va. 1984); *EEOC v. State of New York*, _____ F. Supp. _____, 34 FEP Cases 379 (N.D. N.Y. 1984); *EEOC v. Plessey, Inc.*, _____ F. Supp. _____, 34 FEP Cases 500 (D. Kansas 1984); *EEOC v. International Mill Service, Inc.*, _____ F. Supp. _____, 34 FEP Cases 392 (E.D. Pa. 1984); *EEOC v. Ingersoll Johnson Steel Co.*, 583 F. Supp. 983 (S.D. Ind. 1984); *EEOC v. U.S. Steel Corp.*, _____ F. Supp. _____, 34 FEP Cases 1091 (W.D. Pa. 1984); *EEOC v. Chrysler Corp.*, _____ F. Supp. _____, 34 FEP Cases 1862 (N.D. Ga. 1984); *Muller Optical Co. v. EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983), *appeal pending*, No. 83-5889 (CA 6, docketed November 29, 1983); *EEOC v. Jackson County*, _____ F. Supp. _____, 33 FEP Cases 963 (W.D. Mo. 1983); *EEOC v. City of Memphis*, 581 F. Supp. 179 (W.D. Tenn. 1983); *EEOC v. Cudahy Foods Co.*, _____ F. Supp. _____, 33 FEP Cases 1836 (W.D. Wash. 1983); *EEOC v. El Paso Natural Gas Co.*, _____ F. Supp. _____, 33 FEP Cases 1837 (W.D. Texas 1984).

[3]Martin's primary goal continues to be reduction of litigation expense in the appellate process in a case it believed it had settled. Martin is a reluctant participant in these appeals. Thus, Martin is not pursuing the issues addressed in its Motion for Summary Judgement and Brief in support thereof. Indeed, in its brief to the Eleventh Circuit, Appellee Martin did not address these issues and instead addressed solely the propriety of the district court's refusal to enter the consent decree proposed by the parties.

CONCLUSION

For the reasons stated herein this appeal should be dismissed as the Commission's appeal properly lies under 29 U.S.C. 1291 in the Eleventh Circuit Court of Appeals which has already taken jurisdiction.[4]

Respectfully submitted,

JAMES P. ALEXANDER
James Walker May
Eldridge D. Lacy
1400 Park Place Tower
Birmingham, Al. 35203
(205) 252-4500

Attorneys for Appellee, Martin Industries, Inc.

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

[4]Attached hereto as Appendix A is a copy of the Eleventh Circuit's order taking jurisdiction.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7194

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

versus

MARTIN INDUSTRIES, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

[May 21, 1984]

Before HATCHETT, ANDERSON, and CLARK, Circuit Judges.

BY THE COURT:

The court has taken under consideration whether it has jurisdiction of this case. Based upon the record before us, we tentatively conclude that we do have jurisdiction. However, upon full briefing by the parties and presentation of the merits issue and jurisdictional issue to an oral argument panel of this court, that panel may well determine that jurisdiction is properly in the Supreme Court of the United States. Thus, our tentative ruling does not become the law of the case.